IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARY PATRICIA DOUGHERTY, Appellant, v. CITY OF SEATTLE, SEATTLE FIRE DEPARTMENT, SEATTLE FIRE DEPARTMENT MEDIC ONE, Respondents.	)	No. 62566-7-I UNPUBLISHED OPINION FILED: July 20, 2009

Schindler, J. — In this action for declaratory relief, the trial court erred in denying Mary Dougherty's motion for a change of judge and therefore lacked authority to dismiss her lawsuit. Nevertheless, because Dougherty's claims are either not justiciable or fail as a matter of law, we remand for a different judge to enter an order dismissing the complaint.

FACTS

Mary Dougherty has a chronic heart condition that sometimes causes a rapid and potentially life-threatening heartbeat. When these episodes occur, Dougherty needs immediate medical attention. Her condition has required numerous contacts with emergency personnel during the last fifteen years.

On April 29, 2006, while driving near Husky Stadium, Dougherty experienced a

rapid heartbeat. She pulled into a parking lot and asked the attendant to call 911. Emergency personnel from the Seattle Fire Department (SFD) and Medic One responded and, after obtaining Dougherty's consent, treated her. Medic One personnel contacted an on-call physician, started an IV line and electrocardiogram monitor, and administered a medication that eventually lowered Dougherty's heart rate. After treating her for fifteen minutes, they took her to University Hospital.

Dougherty later requested Medic One's records from the incident. She received what she described as "a two[-]page form and an incomplete [EKG] tracing." CP 25. When additional requests failed to produce more records, she filed the present action for declaratory relief against the City of Seattle, the Seattle Fire Department, and Medic One. The complaint and accompanying affidavit alleged in part that SFD/Medic One had failed to produce certain medical records from the incident. They also alleged that Dougherty repeatedly asked Medic One personnel to transport her to University Hospital, but they declined to do so and told her they would call a cab to transport her if she did not want their assistance.

The complaint requested three declarations: (1) that SFD/ Medic One personnel have a duty to make full disclosure of all medical diagnoses, treatment, or other information relating to their patient contacts; (2) that the information provided to Dougherty by SFD/Medic One was legally inadequate and incomplete; and (3) that a patient has the right to insist that Medic One personnel not administer medical treatment and instead transport him or her to a hospital.

In October, 2006, the superior court issued a case schedule setting trial for April 14, 2008. On March 31, 2008, the assigned judge sua sponte continued trial to May 27, 2008.

On May 5, 2008, Dougherty filed an affidavit of prejudice and moved to disqualify the judge. On May 9, 2008, the court denied the motion on the ground that it had exercised discretion in its earlier order continuing the trial. The court then continued trial, again sua sponte, to June 25, 2008.

Respondents moved to dismiss the complaint under CR 12(b), arguing that there was no justiciable controversy because Dougherty had an adequate remedy at law, had not shown an actual, present dispute, and failed to state a claim upon which relief could be granted. The court dismissed the complaint. Dougherty appeals.

DECISION

Dougherty first contends the superior court erred in denying her motion for a change of judge. We agree.

A party has a right to one change of judge upon timely filing of an affidavit of prejudice. RCW 4.12.040 and .050; State v. Dennison, 115 Wn.2d 609, 619, 801 P.2d 193 (1990). An affidavit of prejudice is timely if "filed before the trial judge has been called upon to make a ruling involving [his or her] discretionary powers[.]" Dennison, 115 Wn.2d at 619; see also RCW 4.12.050. Respondents concede that Dougherty filed her affidavit of prejudice before the superior court made any discretionary rulings. They argue, however, that the affidavit was untimely under CR 40(f). That rule

provides in pertinent part:

> Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a preassigned judge.

Respondents contend this rule required Dougherty to file her affidavit thirty days prior to the first scheduled trial date, and that her failure to do so waived her right to disqualify the judge regardless of whether the trial date was later reset for a date more than thirty days after the filing of her affidavit. We disagree.

When interpreting a court rule, we apply the rules of statutory construction. State v. Osman, 147 Wn. App. 867, 877, 197 P.3d 1198 (2008) rev. denied, 208 P.3d 1124 (2009). If the language of a court rule is plain and unambiguous, we must give effect to that plain meaning. Id., at 877-78. The meaning of CR 40(f) is plain. The rule requires a party to file an affidavit of prejudice "thirty days prior to *trial,*" not thirty days prior to the trial date. This interpretation is consistent with, and supported by, the language of RCW 4.12.050, the statute specifically referenced in the rule. The statute requires affidavits of prejudice to be filed before the court makes any discretionary rulings, and expressly provides that "the arrangement of the calendar" and "the setting of an action . . . for hearing or trial" are not discretionary rulings. The statute thus reflects a legislative determination that case setting and scheduling do not affect the timeliness of an affidavit of prejudice.[1] That determination supports our conclusion

[1] See State v. Dixon, 74 Wn.2d 700, 703, 446 P.2d 329 (1968)("setting and/or renoting and resetting of a cause" is not a discretionary act within the meaning of RCW 4.12.050).

here that it is the trial, not the initial setting of the trial date, that determines the timeliness of an affidavit of prejudice under CR 40(f). The court therefore erred in rejecting the affidavit of prejudice and lacked authority to rule on the motion to dismiss. State v. French, 88 Wn. App. 586, 599, 945 P.2d 752 (1997).

Nevertheless, because Dougherty's claims do not present a justiciable controversy and/or fail as a matter of law, we remand for a different judge to enter an order dismissing the complaint.

It is well settled that a justiciable controversy must exist before a superior court will exercise its authority.[2] Justiciability is a question of law.[3] A controversy is justiciable if there is

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

First Covenant Church of Seattle v. City of Seattle, 114 Wn.2d 392, 398, 787 P.2d 1352 (1990) (quoting Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Applying these principles here, we conclude that Dougherty's

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[2] Nollette v. Christianson, 115 Wn.2d 594, 598-99, 800 P.2d 359 (1990)("In applying the Uniform Declaratory Judgments Act, [Washington courts] have firmly maintained that . . . a justiciable controversy must exist before a court's jurisdiction may be invoked under the act."); Villas at Harbour Pointe Owners Ass'n ex rel. Construction Associates, Inc. v. Mutual of Enumclaw Ins. Co., 137 Wn. App. 751, 760, 154 P.3d 950, 954 (2007) rev. denied, 163 Wn.2d 1020, 180 P.3d 1292 (2008)("For a court to exercise judicial power, there must be a justiciable case or controversy.").

[3] Estate of Friedman v. Pierce County, 112 Wn.2d 68, 75-76, 768 P.2d 462 (1989).

requests for relief do not present a justiciable controversy.

In her complaint, Dougherty sought declaratory relief regarding three matters. The first two concerned the disclosure of medical records from the April 29, 2006 incident. She requested a ruling that "Seattle/SFD/Medic One have a duty, akin to that between physician and patient under Washington law, to make full and complete disclosure of all medical diagnosis, treatment, or other information relating to its contact with a mobile facility's patient [.]" She also requested a ruling that SFD/Medic One's responses to her records requests were "legally inadequate and incomplete, and do not relieve the defendants of their duty to provide all material of any kind relating to contact with the plaintiff . . . ." However, in her response to the motion to dismiss, Dougherty conceded that SFD/Medic One eventually provided her with all existing records related to the April 29, 2006 incident. Moreover, the respondents conceded below that they are governed by the disclosure provisions of the Uniform Health Care Information Act, (UHCIA) chapter RCW 70.02. Dougherty acknowledges that this Act creates a private cause of action for a health care provider's failure to produce existing records upon request. Thus, there is no existing dispute, and therefore no justiciable controversy, regarding the disclosure of Dougherty's medical records.

Dougherty argues, however, that a justiciable controversy exists regarding her medical records because respondents not only had a duty to disclose those records, but also had a duty to *retain* them. This argument fails for several reasons. First, Dougherty's complaint and first response to the motion to dismiss did not assert that

respondents had a duty to *retain* records or allege that they breached that duty. Rather, Dougherty focused solely on the respondents' duty to disclose records under the UHCIA. When respondents conceded their duty under the UHCIA and argued that it provided Dougherty with an adequate remedy, she asserted for the first time that respondents also had a duty to retain her medical records. A court has no jurisdiction to grant declaratory relief beyond that sought in the complaint. School Districts' Alliance for Adequate Funding of Special Educ. v. State, 149 Wn. App. 241, 202 P.3d 990 (2009).

Second, even if the complaint requested such relief, respondents concede, and Dougherty does not dispute, that SFD/Medic One records are governed by RCW 40.14 (entitled "Preservation and destruction of public records"), and that RCW 40.14.070(2)(a) generally requires that public records be retained for six years.[4] Because this statute creates essentially the same duty Dougherty sought to establish below, there is no justiciable controversy regarding respondents' duty to retain records.[5]

In her final request for relief, Dougherty sought a declaration "regarding her right to refuse treatment by Medic One and instead request to receive transport to a

[4] RCW 40.14.070(2)(a) states that "no public records shall be destroyed until approved for destruction by the local records committee" and shall not be destroyed unless the records are six or more years old or other.

[5] We note that Dougherty offered the superior court no legal basis for declaring that respondents' have a duty to retain records. Instead, she asked the court to analogize to a duty applicable to hospitals under RCW 70.41.190. An extension of that statutory duty to emergency medical personnel is a matter for the legislature.

hospital." Dougherty claims a declaratory ruling is necessary for purposes of any future incidents involving SFD and/or Medic One. Respondents argued below that this request for relief was "a textbook description of an interest which is '. . . potential, theoretical, abstract or academic . . . .'" Dougherty cited no authority supporting declaratory relief for hypothetical future events.

In any event, respondents concede that Dougherty has a right to refuse treatment by emergency medical personnel.[6] In fact, the paramedic in charge of the Medic One unit that treated Dougherty testified that he informs Medic One patients of their right to refuse treatment. The only potential controversy, then, is whether Dougherty, after refusing treatment, has a right to insist that emergency personnel transport her to a hospital. Dougherty points to nothing supporting such a right. Absent some legal basis for that right, there is no actual controversy for a court to resolve and/or the claim for relief fails as a matter of law.

We vacate the order of dismissal and remand for entry of an order dismissing the complaint by a different judge.

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.

Agid, J.

[6] See Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007)(recognizing that right to privacy includes right to refuse medical treatment); In re Colyer, 99 Wn.2d 114, 122, 660 P.2d 738 (1983)(patient has right to refuse treatment, although right is not absolute).